IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 7176 of 2000

Converted from

SPECIAL CRIMINAL APPLICATION NO.106 of 2000

For approval and Signature.

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PREMALBHAI CHANDULAL THAKKAR

Versus

DILIPBHAI NATVARLAL SOMAYA

Appearance:

MR NS SHETH for Petitioner

NOTICE SERVED BY DS for Respondent No. 1

MR HL JANI, Learned APP for Respondent No. 2

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 21/11/2000

ORAL JUDGEMENT

Leave granted to the petitioner to convert the

proceedings into Misc. Criminal Application under Section 482 of the Criminal Procedure Code, 1973 (for short "Code"). Petitioner to comply with necessary procedure during the course of the day.

Rule.

Mr. H.L.Jani, learned APP waives service of rule on behalf of respondent no.2. Respondent no.1 is absent though duly served.

1. The petitioner has prayed to quash and set aside the proceedings of criminal complaint initiated by respondent no.1 against the petitioner in the Court of learned Chief Judicial Magistrate, Surendranagar vide Criminal Case No. 791 of 1999. The petitioner has also prayed to quash and set aside the order passed by the learned Chief Judicial Magistrate, Surendranagar below Exh.7 in the proceedings of Criminal Case No. 791 of 1999 whereby the Trial Court has rejected the application of the present petitioner for dropping the proceedings on the grounds stated in the application Exh.7.

2. Respondent no.1 has filed criminal complaint bearing Criminal Case No. 791 of 1999 against the present petitioner in the Court of learned Chief Judicial Magistrate, Surendragar under Section 138 of the Negotiable Instrument Act, 1861 (for short "Act"). It is averred and contended in the complaint that present petitioner, who was shown as accused therein, had obtained Rs. 1,00,000/- for the purpose of his business and promised to repay the sum within 5 months and in order to repay the said amount, issued a cheque bearing no. 052253 dated 7.1.1999 for Rs. 1,00,000/- drawn on Nutan Nagrik Sahkari Bank Ltd., Ahmedabad. That the respondent no.1 was requested by the petitioner to encash the said cheque after 5 months and as such, on 7.6.1999 when respondent no.1 discounted the said cheque through Surendrangar Mercantile Cooperative Bank Ltd., the said cheque returned dishonoured with the endorsement that "account closed". It is further averred and alleged in the complaint that demand notice dated 24.6.1999 was served to the petitioner/accused. However, petitioner/accused has failed to pay the said amount and has given evasive reply and as such, criminal complaint is filed.

That learned Chief Judicial Magistrate, Surendranagar issued process against the petitioner/accused. The petitioner appeared through advocate and filed application Exh.7 with a prayer to

drop the proceedings against the petitioner on the grounds stated in the application. It is averred and contended in application Exh.7 that no amount has been borrowed by the petitioner/accused from the respondent no.1 and no cheque has been given by petitiner/accused to respondent no.1 as alleged in the complaint. It is explained that the respondent no.1 used to come to the place of the petitioner as a business acquaintance and some how other, the cheque lost by the petitioner/accused is obtained by the respondent no.1. It is specifically explained that disputed cheque was lost prior to 12.6.1997 and thereby, the petitioner had intimated his banker Nutan Nagrik Cooperative Bank Ltd. Satellite Branch, Ahmedabad that cheque bearing no. 052253 being lost/stolen, the payment should be stopped if such cheque is discounted by anybody and the account is closed. It is explained in application Exh.7 by petitioner/accused that the respondent no.1 has alleged in the complaint that said cheque which was lost prior to 12.6.1997 bearing no. 052253 was alleged to have been issued by petitioner in favour of respondent no.1 on 7.1.1999 towards due discharge of the amount borrowed by him. On the said fact, the petitioner/accused urged to the Court that disputed cheque not being genuine as he has not drawn the said cheque, he has no business transaction or for any consideration and as such, complaint based on stolen cheque is not maintainable and proceedings are required to be dropped.

3. It is appearnt from the record that learned Chief Judicial Magistrate having considered the material, rejected the application by holding that explanation given by the petitioner in application Exh.7 being a defence could be permitted at the time of trial only and thereby, proceedings could not be dropped in a matter which is being conducted as summons triable.

4. Mr. S.N.Shah, learned advocate for the petitioner urged that learned Chief Judicial Magistrate has erred in law as well as on fact that under Section 239 of the Code, the Court can drop the proceedings if the charge is found groundless. Furthermore, the material fact stated in application Exh.7 is supported by reply of demand notice sent by the petitioner/accused and since, the reply dated 24.6.1999 the petitioner/accused has contended that disputed cheque bearing no. 052253 of Nutan Nagrik Sahkari Bank Ltd., Ahmedabad Branch was stolen and intimation was given to the Bank on 12.6.1997. That said fact is supported by certificate issued by the said Bank. Under the circumstances, the facts are indisputable that the cheque was stolen prior to

12.6.1997 and could not have been issued on 7.1.1999 as alleged by respondent no.1 in the complaint filed before the learned Chief Judicial Magistrae, Ahmedabad. That appreciation of the said fact itself suggest that complaint is mala fide and based on facts which are sufficiently explained and which do not constitute any offence.

5. On scrutiny and verification of the facts as apparent from the certificate issued by Nutan Nagrik Sahkari Bank Ltd., in respect to intimation received about the lost cheque, a copy of reply of demand notice dated 24.6.1999 and statements made in application Exh.7 clearly suggest that the learned Chief Judicial Magistrate has committed an error of fact and having considered the said fact, he ought to have considered that chances of conviction being bleak, the respondent no.1 ought not have been permitted to proceed further with the prosecution of the said complaint and should have dropped the proceedings.

6. On the aforesaid discussion, petition is allowed. The proceedings of Criminal Case no. 791 of 1999 pending in the Court of learned Chief Judicial Magistrate, Suendrangar is hereby quashed and set aside. Rule to that extent is made absolute. No order as to costs.

(A.K.Trivedi, J)
(vipul)